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Statutory Leapfrog: Compensatory and Punitive Damages under the Retaliatory Provision of the ADA

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I. INTRODUCTION

Equality has traditionally been an important issue in many different aspects of American life, and Congress created various laws to ensure that this equality is preserved. One of these laws is the Americans with Disabilities Act of 1990 (ADA). The ADA was created to ensure that those with disabilities would be treated equally in aspects of both public services and accommodations, as well as in the employment sector.[1] Among its many provisions, the ADA serves to protect employees from being discharged from their positions in "retaliation" for opposing practices by the employer that would have also been unlawful under the Act. While the U.S. Circuit Courts have agreed on the application of this "retaliatory provision," they have not agreed on what specific remedies are available to plaintiffs bringing such claims. Congress' statutory construction with regard to remedies has proved to confound courts across the country. As a result, a circuit split has emerged on the availability of compensatory and punitive damages when employers violate the retaliatory provisions of the ADA. In effect, this split has placed employees on unequal footing based on the circuit they currently reside in and the statutory interpretation it utilizes.

Part II of this article will outline the basic provisions of the Americans with Disabilities Act, focusing on claims of employment discrimination and the retaliation provision. Part III will briefly outline the remedy structure of the retaliation provision, noting which statutory sections must be considered when deciding what remedies are appropriate. Then, Part IV will discuss the relevant case law and recent developments on the two different positions taken by various circuit courts with respect to the availability of compensatory and punitive damages as a result of a violation of the retaliatory provision. Finally, Part V will evaluate these two major approaches and lay out the reasons why the U.S. Supreme Court and Congress need to ultimately intervene and resolve the current circuit court split. Ultimately, this resolution will avoid the injustice that results when one employee is able to recover more on his retaliation claim than another based simply on the circuit in which he resides.

1. *See* 42 U.S.C. § 12101 (2000).

II. LEGAL BACKGROUND OF THE AMERICANS WITH DISABILITIES ACT

A. Purpose and Overview

In 1990, the Americans with Disabilities Act (ADA) was passed by Congress and signed into law with the primary purpose of "provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[2] At the time of the Act's passage, Congress determined that approximately forty-three million Americans were living with some sort of physical or mental disability.[3] In addition, Congress found that, because of the discrimination and prejudice that denied these individuals the opportunity to compete with others on an equal basis, the United States as a country was forced to bear a debt of billions of dollars annually in support payments due to dependency and non-productivity.[4] Through the ADA, therefore, Congress sought to remedy these injustices by assuring "equal opportunity" of employment to those with disabilities[5] and the ability "to pursue those opportunities for which our free society is justifiably famous."[6] Thus, Congress was interested in removing the then-existing barriers that kept people with all types of impairments from fully using their skills.[7]

Despite Congressional intent to help those with impairments and disabilities, some have argued that the ADA's analytical "framework makes it . . . difficult [for many plaintiffs] to establish a successful discrimination claim based on an alleged disability."[8] In order to be covered by the ADA, an individual first must demonstrate that he is "disabled." This means that he must show that he has "a physical or mental impairment that substantially limits

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2. *Id.* § 12101(b)(1).

3. *Id.* § 12101(a)(1).

4. *See id.* § 12101(a)(9); H.R. REP. NO. 101-485, pt. 2, at 43 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 325 ("[T]he National Council on the Handicapped states that current (federal) spending on disability benefits and programs exceeds $60 billion annually. Excluding the millions of disabled who want to work from the employment ranks costs society literally billions of dollars annually in support payments and lost income tax revenues.").

5. 42 U.S.C. § 12101(a)(8).

6. *Id.* § 12101(a)(9).

7. Michelle T. Friedland, Note, *Not Disabled Enough: The ADA's "Major Life Activity" Definition of Disability*, 52 STAN. L. REV. 171, 190 (1999). Upon signing the ADA, President Bush stated that "[w]ith today's signing of the landmark Americans with Disabilities Act, every man, woman and child with a disability can now pass through once-closed doors, into a bright new era of equality, independence and freedom." *President Signs Disabilities Act, 2,000 Cheer Long-Awaited Independence*, L.A. DAILY NEWS, July 27, 1990, at N1, *available at* 1990 WLNR 1018724.

8. Mark DeLoach, Note, *Can't We All Just Get Along?: The Treatment of "Interacting with Others" as a Major Life Activity in the Americans with Disabilities Act*, 57 VAND. L. REV. 1313, 1315 (2004).

one or more of [his] major life activities."[9] However, plaintiffs seeking to bring claims under the ADA tend to face numerous problems with the definition of "major life activities." Even though certain activities might be important to an individual plaintiff, they still may not qualify under the ADA if these activities are not significant within the meaning of the Act.[10] While a few "major life activities" have been denoted as significant by the Equal Employment Opportunity Commission (EEOC),[11] courts have largely held the responsibility of determining whether an action or activity qualifies as a "major life activity" sufficient to support a discrimination claim.[12]

Only after a plaintiff is determined to be "disabled" are protections found in the various provisions found in the Act examined. The ADA is generally divided into three subchapters known as "Titles" and one relevant (for purposes of this paper) fourth subchapter known as "Title V" which is named "Miscellaneous Provisions."[13] Title I of the ADA generally prohibits discrimination in the terms and conditions of employment;[14] Title II of the Act addresses discrimination against the disabled with regard to access to public services;[15] and Title III prevents discrimination in public accommodations.[16]

With regard to Title I, which is the most relevant of the main three Titles to the focus of this analysis, a disabled individual will only be protected in the employment sector by the ADA if they are otherwise "qualified" for the

9. 42 U.S.C. § 12102(2)(A) (2000). In the alternative, they may also qualify as disabled if they have "a record of such an impairment" or are "regarded as having such an impairment." *Id.* § 12102(2)(B)-(C).

10. Amir v. St. Louis Univ., 184 F.3d 1017, 1027 (8th Cir. 1999).

11. 28 C.F.R. § 36.104 (2008) (including "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working" as major life activities).

12. *See, e.g.*, *Amir*, 184 F.3d at 1027 (finding that eating, drinking, concentrating, and learning were major life activities); Land v. Baptist Med. Ctr., 164 F.3d 423, 425 (8th Cir. 1999) (finding that attending day care is not a major life activity); McAlindin v. County of San Diego, 192 F.3d 1226, 1230 (9th Cir. 1999) (finding that sleeping, engaging in sexual relations, and interacting with others were major life activities); Fjellestad v. Pizza Hut of Am., Inc., 188 F.3d 944, 948 (8th Cir. 1999) (finding that sitting, standing, lifting, and reaching to be major life activities); Colwell v. Suffolk County Police Dep't, 158 F.3d 635, 643 (2d Cir. 1998) (finding that gardening, golfing, and shopping are not major life activities).

13. Edwards v. Brookhaven Sci. Assocs., LLC, 390 F. Supp. 2d 225, 234 (E.D.N.Y. 2005).

14. *See* 42 U.S.C. §§ 12111-12117 (2000).

15. 42 U.S.C. § 12132 (2000) ("[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.").

16. 42 U.S.C. § 12182(a) (2000) ("No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns . . . or operates a place of public accommodation.").

position involved in the dispute.[17] A "'qualified individual with a disability'" is defined by the Act as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[18] Thus, determining whether someone is qualified involves both identifying the essential functions of the job and assessing whether the individual can perform these functions, either with or without special means of accommodation.[19]

Whether certain job functions are "essential" is a determination made by the court on a case-by-case basis.[20] Courts do have a little guidance, however, as the ADA instructs that some consideration be given to the employer's judgment on the issue.[21] In addition, regulations promulgated by the EEOC provide a general definition of essential functions, stating that they are "the fundamental job duties of the employment position the individual with a disability holds or desires. . . . [This] does not include the marginal functions of the position."[22] Furthermore, the EEOC provides examples of other evidence that should be taken into account when determining whether a specific function of the job is essential under the ADA.[23]

Once a job's essential functions are identified, the court must then decide whether the disabled individual can perform those functions considering any reasonable accommodations that could be provided by the employer.[24] Generally, the ADA classifies something as a "reasonable accommodation" if a modification or adjustment to the job requirements, the work environment, or facilities would enable a qualified individual with a disability to work reasonably the same as one that is not disabled.[25] Thus, if a disabled employee can show that he could perform the essential functions of the job if an accommodation was made, the ADA mandates that the employer provide such assistance.[26]

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17. *See id.* § 12112(a).

18. *Id.* § 12111(8).

19. DeLoach, *supra* note 8, at 1329.

20. *Id.* at 1330.

21. 42 U.S.C. § 12111(8). This section also provides that "if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall [also] be considered [as] evidence of . . . essential functions." *Id.*

22. 29 C.F.R. § 1630.2(n)(1) (2008).

23. *See id.* § 1630.2(n)(2)-(3).

24. DeLoach, *supra* note 8, at 1330.

25. 42 U.S.C. § 12111(9). Among those specific accommodations mentioned are "making existing facilities used by employees readily accessible to and usable by individuals with disabilities, . . . job restructuring, part-time or modified work schedules, . . . modification[] of . . . training materials or policies, [and] provision of qualified readers or interpreters." *Id.*

26. *See* Leslie Goddard, *Searching for Balance in the ADA: Recent Developments in the Legal and Practical Issues of Reasonable Accommodation*, 35 IDAHO L. REV. 227, 230 (1999). However, this affirmative duty on employers is not absolute.

B. The Retaliation Provision

The ADA not only assists individuals in accessing employment opportunities, public accommodations and services, but it also protects the individuals from discrimination based on their disability *after* gaining such employment. Title V of the "Miscellaneous Provisions" subchapter contains an anti-retaliation clause in Section 12203. This provision provides that "[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter."[27] This section is commonly utilized, for example, in a situation when an employee opposes an employer's action based on potential discrimination under the ADA and is subsequently terminated from his or her job;[28] or similarly, when an employee files a complaint with the EEOC and is thereafter terminated.[29]

In either situation, however, a plaintiff must show three specific elements to establish a prima facie case for retaliatory discharge: (1) that the plaintiff "engaged in protected opposition to ADA discrimination or participated in an ADA proceeding;" (2) that the plaintiff "suffered an adverse employment action [after or] contemporaneously with [the] opposition;" and (3) that "there is a causal connection between" the two events.[30] If the plaintiff can do this, then the burden shifts to the employer to articulate legitimate, non-retaliatory reasons for the adverse action.[31] However, the plaintiff can respond to the employer's arguments by showing that the proffered reasons are pretextual, meaning that "discriminatory reason[s] more likely [than not]

The ADA provides that accommodation is not required if an employer can show that the accommodation poses an "undue hardship," which is defined as "an action requiring significant difficulty or expense, when considered in light of [other] factors set forth." *See* 42 U.S.C. §§ 12111(10)(A), 12112(b)(5)(A) (2000). However, in absence of this, the employer is not allowed to discriminate against an individual on the basis of their disability.

27. 42 U.S.C. § 12203(a) (2000). This section also contains a prohibition on coercion, interference, and intimidation as well, providing that an employer cannot engage in these actions because someone is enjoying one of his rights under this Act, or for aiding or encouraging someone else to enjoy these same rights. *Id.* § 12203(b).

28. *See, e.g.*, Sabbrese v. Lowe's Home Ctrs., Inc., 320 F. Supp. 2d 311, 316 (W.D. Pa. 2004); Lovejoy-Wilson v. NOCO Motor Fuels, Inc., 242 F. Supp. 2d 236, 239 (W.D.N.Y. 2003); Foster v. Time Warner Entm't Co., 250 F.3d 1189, 1193-94 (8th Cir. 2001).

29. *See, e.g.*, Edwards v. Brookhaven Sci. Assocs., LLC, 390 F. Supp. 2d, 225, 228-29 (E.D.N.Y. 2005); Salitros v. Chrysler Corp., 306 F.3d 562, 567-68 (8th Cir. 2002); Sink v. Wal-Mart Stores, Inc., 147 F. Supp. 2d 1085, 1089 (D. Kan. 2001).

30. Cisneros v. Wilson, 226 F.3d 1113, 1132-33 (10th Cir. 2000); *see also* Schoffstall v. Henderson, 223 F.3d 818, 826 (8th Cir. 2000).

31. Medlock v. Ortho Biotech, Inc., 164 F.3d 545, 550 (10th Cir. 1999).

motivated the employer or that the employer's [reasons are] unworthy of credence."[32]

III. BASIC REMEDY STRUCTURE UNDER THE RETALIATION PROVISION

If an employee is successful on his claim of retaliation, the ADA details the remedies available to the employee. While the retaliatory provision applies to the three primary chapters, however, it does not contain its own remedial provision.[33] Instead, Section 12203 incorporates the separate remedies provision of each primary subchapter for retaliation claims with respect to that subchapter.[34] Thus, in cases that involve retaliation by an employer against an employee, the remedial provisions of subchapter I, specifically Section 12117, control because subchapter I deals specifically with discrimination in the employment sector.[35]

Because Section 12117 simply adopts the remedial provisions of Title VII of the Civil Rights Act of 1964, the language of Section 12117 does not provide definite answers as to what remedies are available for a violation of the retaliatory provision.[36] This section provides that "[t]he powers, remedies, and procedures set forth in Sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures

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32. *Cisneros*, 226 F.3d at 1133 (internal quotations omitted) (citing Shorter v. ICG Holdings, Inc., 188 F.3d 1204, 1208 (10th Cir. 1999)). Because a claim of retaliation is independent from any other claim that the plaintiff might bring under the ADA, his or her eventual success on the underlying ADA violation is irrelevant to the success of the retaliation claim. Mesnick v. Gen. Elec. Co., 950 F.2d 816, 827 (1st Cir. 1991). In addition, the employee bringing the retaliation claim need not show that the complained of conduct was actually a violation of the ADA, but rather only needs to demonstrate that "he possessed a good faith, reasonable belief that the . . . challenged actions . . . violated that law." Sarno v. Douglas Elliman-Gibbons & Ives, Inc., 183 F.3d 155, 159 (2d Cir. 1999) (internal quotations omitted).

33. Boe v. AlliedSignal, Inc., 131 F. Supp. 2d 1197, 1202 (D. Kan. 2001).

34. *Id.* Section 12203 specifically reads, "[t]he remedies and procedures available under [S]ections 12117, 12133, and 12188 of this title shall be available to aggrieved persons for violations of subsections (a) and (b) of this section, with respect to subchapter I, subchapter II and subchapter III of this chapter, respectively." 42 U.S.C. § 12203(c) (2000).

35. *AlliedSignal*, 131 F. Supp. 2d at 1202. Similarly, if a retaliation action involved access to public services, the remedy provisions of subchapter II (Section 12133) would be controlling because subchapter II governs this type of discrimination. *See* 42 U.S.C. § 12133 (2000). And, along these same lines, retaliatory actions involving public accommodations would use the remedy provisions of subchapter III (Section 12188). *See* 42 U.S.C. § 12188 (2000).

36. *AlliedSignal*, 131 F. Supp. 2d at 1202. Title VII of the Civil Rights Act of 1964 deals specifically with equal employment opportunities and is codified in 42 U.S.C. §§ 2000e to 2000e-17 (2000).

[that] this subchapter provides to . . . any person alleging discrimination on the basis of disability in violation of any provision of this chapter."[37] Therefore, the court must look to the provisions of the Civil Rights Act, specifically the enforcement provision found in Section 2000e-5,[38] for guidance on the types of remedies it can grant a successful plaintiff on a claim for retaliatory discharge. Section 2000e-5, in turn, provides for a number of different types of remedies, ranging from reinstatement or rehiring the employee to their former position, awarding of back-pay, or any other equitable relief that the court deems appropriate.[39] Notably, however, this section does not provide for compensatory or punitive damages.[40]

One might think that a court trying to decide what remedies are available has finally reached the answer it has been looking for in first reading the language of Section 12203. However, that is not necessarily the case, as there is one more statutory provision to consider. One year after the ADA was passed, Congress created the Civil Rights Act of 1991 in order to provide additional remedies to deter unlawful harassment and discrimination in the workplace.[41] In doing so, Congress effectively expanded the potential remedies available for violations of the original Civil Rights Act of 1964 and, consequently, violations of other discrimination legislation that incorporate the remedial provisions of that Act.

One piece of legislation that incorporates remedial provisions of the Civil Rights Act is the retaliatory provision of the ADA.[42] This means that a court must consider the language of the 1991 Civil Rights Act amendment as it relates to violations of the ADA. The 1991 Act provides, among other things, that in actions against a respondent who engaged in unlawful discrimination, a plaintiff, "may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by Section 706(g) of the Civil Rights Act of 1964, from the respondent."[43] Importantly, however, the statute only expressly mentions Sections 12112 and 12112(b)(5) of the ADA when speaking of violations that give rise to a

37. *Id.* § 12117(a).

38. *Id.* § 2000e-5.

39. *Id.* § 2000e-5(g)(1) ("If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.").

40. *See id.*

41. H.R. REP. NO. 102-40, pt. 2, at 2 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 549.

42. *See infra* notes 43-44 and accompanying text.

43. 42 U.S.C. § 1981a(a)(2) (2000). The reference to Section 706(g) of the Civil Rights Act of 1964 is the same remedy provision found in Section 2000e-5, discussed above. *See* 42 U.S.C. § 2000e-5(g)(1).

recovery of punitive and compensatory damages by the complaining party.[44] The statute does not make any direct reference to the retaliation provision of the ADA found in Section 12203.

Because of the aforementioned complexities, circuit courts are unable to reach a consistent answer as to what types of remedies are available in a retaliatory discharge action under the ADA. The next section will demonstrate that, due to different methods of statutory interpretation of the language of Section 1981a, a plaintiff's entitlement to compensatory and punitive damages for a retaliatory discharge depends on which circuit hears his case.

IV. INTERPRETING THE REMEDY PROVISIONS

A. Broad Constructionists – Allowing Recovery

One of the earliest cases to interpret how these various statutes interact was *Ostrach v. Regents of the University of California*.[45] In this case, the plaintiff was a male Ph.D. candidate employed as a staff research associate by the School of Veterinary Medicine at the University of California-Davis.[46] He claimed to "suffer[] from 'Ehler-Danlos Syndrome' which . . . caus[ed] him difficulty with fine manual dexterity and repetitive motion."[47] Following a discharge from his position in September of 1995, the plaintiff sued the Regents of the University of California in addition to other individuals associated with the University.[48] In his complaint, the plaintiff stated that his employers fired him because of his disability and that he was discharged in retaliation for filing a grievance asserting discrimination due to his disability, and therefore sought general damages under the ADA.[49]

In determining what damages were available, the California District Court concluded that the referral and re-referral process found in the language of the various statutes seemed to only point to Sections 2000e-5(g) and 2000a-3(a), later modified by the Civil Rights Act of 1991.[50] Nevertheless, the court determined that "Congress [had] provided for the recovery of both general and punitive damages for a willful violation of the [retaliation] provision[] of the ADA."[51] The court used a relatively broad approach in its

44. *See* 42 U.S.C. § 1981a(a)(2).

45. 957 F. Supp. 196 (E.D. Cal. 1997).

46. *Id.* at 197.

47. *Id.*

48. *Id.* The individual defendants included the plaintiff's work supervisor and major professor, the Associate Vice Chancellor for Human Resources at UC Davis, the Assistant Dean of Administration at UC Davis School of Veterinary Medicine, the Chancellor of UC Davis, and a supervisory employee of UC Regents and Hinton. *Id.* at 197 n.2.

49. *Id.* at 197.

50. *Id.* at 200-01.

51. *Id.* at 200.

interpretation and focused not on which ADA sections were expressly mentioned in the specific language of Section 1981a, but rather on how a "complaining party" was defined within the meaning of the section.[52] In doing so, the court found that "complaining party" included actions for violations of Title I of the ADA and "thus [appeared] to include suits charging retaliation."[53] Therefore, the court concluded that a plaintiff alleging a retaliation claim was entitled to a full recovery.[54] The court stated that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."[55] As a result, under this reading of Section 1981a, a plaintiff is eligible to recover both compensatory and punitive damages.

In the years following *Ostrach*, courts in the Second, Tenth, and Eighth Circuits affirmed awards of compensatory and punitive damages for violations of the ADA's retaliation provision, seemingly without questioning whether such remedies were even available.[56] In 2002, however, the District Court of Maryland addressed this issue in *Rhoads v. FDIC*.[57] In this case, the plaintiff suffered from asthma and was very sensitive to cigarette smoke, which caused difficulties while she was at work because many other employees smoked while at the office.[58] Following various periods of sick leave due to illnesses suffered as a result of exposure to the smoke, the plaintiff was terminated when she failed to report to work after her sick leave expired.[59] She then brought a number of claims against her employer, including one for retaliatory discharge, seeking both compensatory and punitive damages.[60]

In ruling solely on the issue of damages available under the retaliation provision of the ADA, the court began its analysis by examining the typical

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52. *See id.* at 201.

53. *Id.* The court noted that while it is true that the retaliation provision does actually appear in Title IV of the ADA, "it specifically provides that retaliation in the . . . context [of employment discrimination] constitutes a violation with respect to Title I for purposes of the remedies available." *Id.* at 201 n.10.

54. *Id.* at 201.

55. *Id.* (citing Bell v. Hood, 327 U.S. 678, 684 (1946)). The court also referenced another district court decision that also concluded the availability of general damages for plaintiffs asserting claims under Section 12203 by an extension of reasoning of the Rehabilitation Act of 1973. *Id.* at 201 & n.11 (referring to Niece v. Fitzner, 922 F. Supp. 1208, 1219 (E.D. Mich. 1996)).

56. *See, e.g.*, Salitros v. Chrysler Corp., 306 F.3d 562, 570 (8th Cir. 2002); Foster v. Time Warner Entm't Co., 250 F.3d 1189, 1196-98 (8th Cir. 2001); Muller v. Costello, 187 F.3d 298, 315 (2d Cir. 1999); Equal Employment Opportunity Comm'n v. Wal-Mart Stores, Inc., 187 F.3d 1241, 1243-44 (10th Cir. 1999).

57. No. CCB-94-1548, 2002 WL 31755427 (D. Md. Nov. 7, 2002). The court addressed the issue of damage availability during a motion hearing that was independent from the ultimate decision delivered on all of the case. *Id.* at *1.

58. Rhoads v. FDIC, 956 F. Supp. 1239, 1243-44 (D. Md. 1997).

59. *Id.* at 1244-45.

60. *Id.* at 1242-43.

referral process of the various statutes involved in the case.[61] Ultimately, the court concluded the remedies available for violations of the retaliation provision were the same as those available under Title VII of Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991.[62] The court then turned to the legislative history of the ADA for guidance and determined that the "ADA committee reports 'clearly indicat[ed] Congress' intent to parallel the powers, remedies, and procedures developed by case law under Title VII.'"[63] Moreover, a House of Representatives Report also noted that, if the procedures and remedies of Title VII were to change, they would be changed identically under the ADA as well.[64] Thus, the court concluded that the plaintiff was entitled to recover compensatory damages.[65]

Finally, another prominent example of a court that awarded compensatory and punitive damages for a violation of the retaliatory provision of the ADA came in 2005 with the New York case of *Edwards v. Brookhaven Science Associates, LLC*.[66] In this case, the plaintiff worked as a security officer and was injured during a routine training procedure at a firearms range.[67] Following this accident, the firearm range was closed and the plaintiff was discharged from his position after yet another firearm incident.[68] In his complaint, the plaintiff contended that his termination was in retaliation for a previous filing of a complaint of disability discrimination in the form of continued resentment by training specialists due to the closing of the firearm range.[69]

In determining which remedies were available to the plaintiff, the court "examin[ed] the language of the statute 'in light of context, structure, and related statutory provisions.'"[70] After going through a similar statutory

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61. *See Rhoads*, 2002 WL 31755427, at *1. The "referral process" involves moving from Section 12203 to the remedy provisions of subchapter I found in Section 12217, and then considering the language of Title VII of the Civil Rights Act of 1964 with additional amendments added in 1991.

62. *Id.* at *1.

63. *Id.* (quoting Baumgardner v. County of Cook, 108 F. Supp. 2d 1041, 1044-45 (N.D. Ill. 2000)).

64. *Id.* (quoting H.R. REP. NO. 101-485, pt. 3, at 48 (1990)).

65. *Id.* at *2. The court also addressed punitive damages, but did not discuss them in light of availability because they determined "the purpose of punitive damages [did] not support their assessment [to] governmental agencies, such as the FDIC." *Id.* However, after the Seventh Circuit found that compensatory damages could not be recovered, *see infra* notes 95-106, this summary judgment ruling was reversed on appeal. Rhoads v. FDIC, 94 F. App'x 187 (4th Cir. 2004).

66. 390 F. Supp. 2d 225 (E.D.N.Y. 2005).

67. *Id.* at 227-28. The incident severely injured the plaintiff's index finger. *Id.* at 228.

68. *Id.* at 228-29.

69. *Id.* at 229.

70. *Id.* at 234 (quoting Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 558 (2005)).

analysis to the aforementioned courts,[71] the instant court found that although the retaliatory provision was not expressly mentioned in the Civil Rights Act of 1991 (specifically Section 1981), "it is of no consequence when [Section] 1981 is read in conjunction with the relevant provisions of the ADA."[72] Essentially, the remedies of the retaliatory provision in a case of employment discrimination were the same as Title I of the ADA, because the retaliatory provision incorporates the remedies into Section 12203.[73] Therefore, the court concluded that "[c]onsidering that the remedies available for retaliation . . . are commensurate with those available under Title I, it was unnecessary for Congress to separately mention retaliation in [Section] 1981."[74] As such, the court held that it was "fair to assume" that the effect of Section 1981a applies equally to Title I as it does to the retaliatory provision, because their remedies are co-extensive with one another.[75]

It therefore appears that when courts broadly interpret the remedies available for violations of the retaliatory provision of the ADA, plaintiffs are able to recover both compensatory and punitive damages. However, not all courts have chosen to interpret the retaliatory provision in such a flexible manner, and instead use a stricter reading of the statutes to reach the opposite conclusion.

B. Strict Constructionists – Denying Recovery

The first prominent case ruling that plaintiffs were not entitled to compensatory and punitive damages as a result of a violation of the retaliatory provision of the ADA was *Brown v. City of Lee's Summit*.[76] The plaintiff in this case claimed that his employer "failed to reasonably accommodate [his required] annual cardiovascular treadmill assessment and that [he] was subsequently demoted in retaliation for comments he made about that . . . assessment."[77] Addressing the availability of damages, the Western District Court of Missouri stated that "[a]s a careful reading of [Section 1981a] makes clear, compensatory and punitive damages are now available for proven violations of some specific sections of the ADA, but not others."[78] According to the court, the Civil Rights Act of 1991, which is codified in part in Section 1981a, "authorize[s] compensatory and punitive damages for violation[s] of *certain* enumerated ADA sections [but] does not list the ADA's retaliation

71. Meaning, the court stated how the remedy provisions of the statutes refer to other provisions and incorporate their remedies. *See id.* at 235.

72. *Id.* at 236.

73. *Id.*

74. *Id.*

75. *Id.*

76. No. 98-0438-CV-W-2, 1999 U.S. Dist. LEXIS 17671 (W.D. Mo. June 1, 1999).

77. *Id.* at *1.

78. *Id.* at *7-8.

provision" as one of them.[79] "Thus, [after] a meticulous tracing of the language of this tangle of interrelated statutes," the court found no valid basis for awarding the plaintiff compensatory and punitive damages due to the omission of the retaliatory provision from Section 1981a.[80]

The *Brown* court also pointed out flaws in other cases such as *Ostrach v. Regents of the University of California*, which found compensatory and punitive damages were available for violations of the retaliatory provision.[81] It criticized the *Ostrach* court for overlooking the plain language of Section 1981a by deliberately omitting "the enumerated list of eligible statutory provisions for which 'the complaining party may recover compensatory and punitive damages.'"[82] The *Brown* court then went on to say that "[t]he *Ostrach* court appears to have gone out of its way to declare a remedy that the plain language of the statutes involved . . . simply did not provide, and then cited case law that would be relevant only if Congress had not specified the availability of only certain remedies."[83] Therefore, the *Ostrach* court did not have the right to "presume the availability of all appropriate remedies"[84] as it chose to do, because Congress expressly chose to omit the retaliatory provision from the enumerated list of statutes in Section 1981a.[85] The *Brown* court, as a result, felt no obligation to follow the lead of the *Ostrach* court.[86]

Just two years later, two cases in the District Court of Kansas reaffirmed the principles laid out in the 1999 *Brown* decision. In January 2001 in *Boe v. AlliedSignal, Inc.*,[87] the court ruled on the availability of damages to a bipolar plaintiff who alleged that he had been discharged on account of his disease

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79. *Id.* at *8 (emphasis added).

80. *Id.*

81. *Id.* at *8-10 (discussing Ostrach v. Regents of the Univ. of Cal., 957 F. Supp. 196 (E.D. Cal. 1997)).

82. *Id.* at *10. The language in *Ostrach* to which the court referred stated:

> "in an action brought by a complaining party under the powers, remedies and procedures set forth in [Section] 716 or 717 of the Civil Rights Act of 1964 (as provided in [S]ection 107(a) of the Americans with Disabilities Act of 1990) against a respondent who engaged in unlawful intentional discrimination . . . the complaining party may recover compensatory and punitive damages. . . ."

Id. (quoting *Ostrach*, 957 F. Supp. at 201).

83. *Id.* at *11-12.

84. *Ostrach*, 957 F. Supp. at 201 (citing Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 66 (1992)).

85. *See Brown*, 1999 U.S. Dist. LEXIS 17671, at *11-12.

86. *Id.* at *9. The court also distinguished itself from the case of *Niece v. Fitzner* because it determined that the retaliation claim in that case incorporated the remedies of Subchapter II of the ADA. Subchapter II, in turn, incorporated the remedies of the Rehabilitation Act of 1973, which expressly allows compensatory damages. Therefore, the court determined that this case was inapplicable to the current situation. *Id.* at *12-13.

87. 131 F. Supp. 2d 1197 (D. Kan. 2001).

and its effects at the workplace.[88] By tracing the specific language of Section 1981a, the *Boe* court found that:

> [t]he statutory language indicates that compensatory and punitive damages are available for violations of [Sections] 12112 and 12112(b)(5). The statute makes no mention of [Section] 12203. Because the provision does not mention [Section] 12203, the court must conclude that Congress did not intend to provide for compensatory and punitive damages for retaliation claims under [Section] 12203.[89]

Therefore, the court in this case concluded as *Brown* had; that the plaintiff was only entitled to equitable relief on his retaliation claim under the ADA.[90]

A few months later, in June of 2001, the same court reached the same result in *Sink v. Wal-Mart Stores, Inc.*[91] Here the court granted the defendant's motion for summary judgment on the issue of compensatory and punitive damages in connection with the plaintiff's' retaliation claim, holding that "the statutory language and legislative history of the ADA simply [did] not support a valid basis for [such] a claim.[92] The court went on to say that "[w]hile the court can discern no logic in a rule that precludes an award of compensatory and punitive damages in an ADA retaliation case when such damages are available in Title VII retaliation cases, the court is nonetheless confined to the construction of the statute."[93] Therefore, the court ruled that if the plaintiff were to succeed on his claim of retaliation against the defendant, his "remedy [would] be limited to declaratory and/or injunctive relief."[94]

Perhaps the most noteworthy case denying compensatory and punitive damages is the Seventh Circuit decision of *Kramer v. Banc of America Securities, LLC*.[95] In this case, the plaintiff was demoted from her position after her supervisor expressed concerns about the plaintiff's job performance.[96] In the next several months, the plaintiff responded to this demotion through a

88. *Id.* at 1200-01.

89. *Id.* at 1203.

90. *Id.*

91. 147 F. Supp. 2d 1085 (D. Kan. 2001).

92. *Id.* at 1100-01.

93. *Id.* at 1101. The court also stated that "while [at this time it could not] say whether Congress intended such a rule or [if] the rule is simply the result of an oversight by Congress, it is an issue that Congress should address." *Id.*

94. *Id.*

95. 355 F.3d 961 (7th Cir. 2004). This is arguably the current standard used by courts today for the position of denying recovery of compensatory and punitive damages.

96. *Id.* at 963. The plaintiff's responsibilities in her position "included heading a team responsible for the structuring of loans for middle market companies so that the loans could be syndicated to other financial institutions." *Id.*

letter from her lawyer and by filing complaints with the EEOC alleging discrimination based on her multiple sclerosis.[97] Soon after these complaints were filed, the plaintiff was terminated from her position, and she subsequently filed suit alleging disability discrimination and retaliation under the ADA.[98]

In considering the availability of compensatory and punitive damages, the Seventh Circuit, as other courts had previously done, arrived at the language of Section 1981a.[99] It concluded, as did the court in *Brown*, that the specific language of the statute does not contemplate such damages for a retaliation claim under the ADA, since this type of claim is not specifically enumerated within the ADA.[100] In defending its interpretation, the court quoted a Supreme Court case that declared, "'[a] frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.'"[101]

The Seventh Circuit also stated that other rulings which held that compensatory and punitive damages are available in ADA retaliation claims are not persuasive.[102] First, the court noted that some of the decisions did not actually address whether or not these damages were even available, making them not entirely applicable to this situation.[103] Moreover, the court believed that those cases which rely on legislative history of the ADA for answers are also misplaced because, as it stated, "[w]e need not resort to a committee report's summary of legislative intent when the statute is specific."[104] Instead, "'courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then this first canon is also the last: judicial inquiry is complete.'"[105] Therefore, the court reasoned that "[b]ecause the plain language of [Section 1981a] limits its application to specific claims, it [was] inappropriate to [extend] the scope of the statute in reliance on legislative history to include claims for retaliation by an employer under the ADA."[106]

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97. *Id.*
98. *Id.*
99. *Id.* at 964-65.
100. *Id.* at 965.
101. *Id.* (quoting Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974)).
102. *Id.* at 966.
103. *See id.* (referring to Muller v. Costello, 187 F.3d 298 (2d Cir. 1999)).
104. *Id.* (citing McCoy v. Gilbert, 270 F.3d 503, 510 n.4 (7th Cir. 2001)).
105. *Id.* (internal quotations omitted) (citing Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992)).
106. *Id.*

C. *Recent Developments* – Rumler v. Department of Corrections

The Seventh Circuit's decision in *Kramer* has had a definite impact on the availability of compensatory and punitive damages. In the years since it came down, some courts have adopted the *Kramer* ruling in their own opinions and the Fourth Circuit has even overruled a district court decision finding that such damages were not available.[107] However, the most recent case on this issue reverted back to the reasoning of *Ostrach* and other decisions allowing such recovery. In *Rumler v. Department of Corrections*,[108] the plaintiff was terminated from her position as a state corrections officer after a series of disagreements with her employer over sick leave and workers' compensation requests relating to injuries she sustained after an attack by an inmate.[109] In her complaint, she alleged that her termination was a direct result of those requests and thus violated the retaliatory provision of the ADA and Florida law.[110] Despite the defendant employer's urging to follow the *Kramer* ruling, the court instead chose to look at the scope of Section 1981a by not only focusing on the language of the statute, but also "'in light of the context, structure, and related statutory provisions.'"[111]

With this approach in mind, the court found that it was inconsequential that the retaliatory provision of the ADA was specifically omitted from the language of Section 1981a, something that was of the utmost importance in *Kramer*.[112] Rather, the court focused on the fact that the remedies of the retaliatory provision were *the same as* the remedies for violations of Title I of the ADA.[113] Thus, "[i]t [was] not significant that Congress did not reiterate this link in the 1991 amendments. To do so would have been redundant as [Section] 12203 already provided that plaintiffs claiming retaliation in the employment context could avail themselves of the same remedies as plaintiffs claiming discrimination under Title I."[114] Thus, when Congress expanded the remedies of Title I, they expanded the remedies of the retaliatory provision at the same time, thereby allowing plaintiffs to seek compensatory and punitive damages in retaliation claims.[115]

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107. *See, e.g.*, Bowles v. Carolina Cargo, Inc., 100 F. App'x 889 (4th Cir. 2004); Sabbrese v. Lowe's Home Ctrs., Inc., 320 F. Supp. 2d 311 (W.D. Pa. 2004); Rhoads v. FDIC, 94 F. App'x 187 (4th Cir. 2004), *rev'g* No. CCB-94-1548, 2002 WL 31755427 (D. Md. Nov. 7, 2002).

108. 546 F. Supp. 2d 1334 (M.D. Fla. 2008).

109. *Id.* at 1336-37.

110. *Id.* at 1337-38.

111. *Id.* at 1339, 1342 (quoting Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 558 (2005)).

112. *Id.* at 1342.

113. *Id.*

114. *Id.* at 1343.

115. *Id.*

V. COMMENT

Given the complexity of the various statutes involved in interpreting the retaliatory provisions of the ADA and the constant referral that must be undertaken in order to reach the correct answer, it is no surprise that courts have struggled, not only to interpret the retaliatory provision of the ADA, but also to determine what remedies are available under it. This has given rise, therefore, to a situation where the circuits are split on the availability of compensatory and punitive damages, with each circuit forming a methodology of statutory interpretation based on slightly different grounds. In order to decide which remedies are available, canons of statutory interpretation and policy grounds must both be considered. By focusing on these two notions in evaluating each approach taken by the circuit courts, it is clear that neither satisfactorily meets both criteria.

A. Principles of Statutory Interpretation

In one sense, the strict constructionist approach utilized in *Brown* and *Kramer* appears to be the superior methodology when looking at the issue from the statutory interpretation point of view. The plain language of Section 1981a, the essential section of this analysis, clearly refers only to Sections 12112 and 12112(b)(5).[116] Therefore, it is logical to deduce that, because Congress specifically chose to include those references, it also chose to omit specific sections as well. The language of the statute is clear and unambiguous, and reference to the retaliatory provision is simply not there. In a situation such as this, a court must adhere to the construction of the statute and, as some courts have stressed, presume that Congress meant what it has said.[117] If a court were to go beyond this and read extra remedies into the statute, it would basically be invading the provinces of the legislature and its powers to pass laws in the country as elected officials.

However, as previously alluded, a broader interpretation which allows for recovery of compensatory and punitive damages is founded on a logical basis. In fact, given the myriad of statutes that courts have to take into account in making interpretive decisions, it is somewhat difficult to fault a court for making such a ruling. Nonetheless, the approaches that utilize the broad method of interpretation are much less desirable when focusing on principles of statutory interpretation. For instance, as the court in *Brown* recognized, the reasoning of the *Ostrach* court is majorly flawed in that it omitted precise language of Section 1981a that specifically referenced two different sections

116. *See* 42 U.S.C. § 1981a(a)(2) (2000).

117. *See, e.g.*, Kramer v. Banc of Am. Sec., LLC, 355 F.3d 961, 966 (7th Cir. 2004); Sink v. Wal-Mart Stores, Inc., 147 F. Supp. 2d 1085, 1101 (D. Kan. 2001).

of the ADA.[118] In effect, therefore, when the *Ostrach* court stated that the statute actually suggested compensatory and punitive damages could be recovered, it did so without even considering the entirety of the Section 1981a. Thus, the court did not first consider the plain language of the statute when striving to interpret it, something that should be the starting point in any statutory analysis.[119]

Other decisions that have used a broad interpretation of Section 1981a do not present the same problems as *Ostrach*, as they considered all of the language of the statute. However, their methodologies still misconstrue the exact language of the statute in order to allow recovery. The approaches in *Edwards* and *Rumler*, for example, both rely on the fact that the remedies of the retaliatory provision and those of Title I of the ADA are the same due to Section 12203's incorporation clause.[120] While this similarity is true, assuming that this means that Title I and the retaliatory provision are to be treated exactly the same under Section 1981a is, at least to some extent, a leap in logic given the explicit language of the statute.[121] Title I and the retaliatory provision are two distinct subparts of the ADA and are two *separate* causes of action. While their remedies might be the same, to say that the mentioning of one of them in Section 1981a impliedly means that both are included is not sound logic, especially when the language is plain and unambiguous.

B. Principles of Policy and Justice

Looking at the broader and narrower approaches from a public policy perspective, however, leads to a different result. Under this lens, as will be illustrated below, it seems as if the broader interpretive approach that allows recovery of compensatory and punitive damages is the superior methodology. The following example, for instance, exemplifies the problem of the current

118. Brown v. City of Lee's Summit, No. 98-0438-CV-W-2, 1999 U.S. Dist. LEXIS 17671, at *10 (W.D. Mo. June 1, 1999) (referring to Ostrach v. Regents of the Univ. of Cal., 957 F. Supp. 196 (E.D. Cal. 1997)).

119. *See, e.g.*, Kelly v. Boeing Petroleum Servs., Inc., 61 F.3d 350, 362 (5th Cir. 1995) ("Our starting point is with the plain language of the statute under which [the plaintiff] brought his suit, acknowledging that 'if language is plain and unambiguous, it must be given effect.'" (quoting WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, LEGISLATION 707 (2d ed. 1995))). The analysis of the *Ostrach* court considered the Supreme Court's reasoning that "a federal court must 'presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise'" to justify its holding. *Ostrach*, 957 F. Supp. at 201 (quoting Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 66 (1992)). However, its reliance on this maxim is misplaced because in this case, Congress *did specify* the availability of only certain remedies in Section 1981a. *See* 42 U.S.C. § 1981a(a)(2) (2000).

120. *See supra* notes 73-75, 112-15 and accompanying text.

121. The pertinent part of Section 1981a that refers to the ADA mentions only "[S]ection 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of [S]ection 102(b)(5) of the Act." 42 U.S.C. § 1981a(a)(2).

circuit split and the realistic effects it has on different plaintiffs bringing claims of retaliation.

Imagine that Employee A lives and works for an electric company in St. Louis, Missouri, and that Employee B lives and works for a different electric company in Alton, Illinois (just across the Mississippi River from St. Louis). Both employees have the exact same position within their respective companies, and both also suffer from the same medical condition that causes anxiety attacks and sometimes impairs their ability to interact with others. After a period of time, both employees are demoted to a lower position within the company because their employers claim that there are concerns about job performance and customer satisfaction. However, each employee believes that his demotion is because of the medical condition he has, and each subsequently files a complaint with the EEOC. Several months later, each employee is fired from his respective position.

To this point, the situations of both Employee A and Employee B have been identical, but because of the circuit split on the way the retaliatory discharge provision is interpreted, their roads to recovery will now be remarkably different. Employee A, who lives in St. Louis and would be subject to the holdings of the Eight Circuit, would be allowed to recover compensatory and punitive damages if he were to bring suit against his employer because of prior decisions affirming such awards.[122] However, Employee B lives in Illinois and would be subject to the holdings of the Seventh Circuit, particularly *Kramer*, and would therefore be denied such damages due to the strict statutory interpretation used in this circuit.[123]

So, while Employee A and Employee B are in the exact same situation in this hypothetical and live minutes away from one another, one is going to be able to get more out of his suit than the other simply on account of geography. Because the ADA is all about generating equality for those with disabilities, it is bitterly ironic that the current split in interpretation generates a new form of inequality between individuals in different jurisdictions. It is neither fair nor just that the same statutory language can produce totally different results by allowing recovery of compensatory and punitive damages in one instance, and then denying them in another. Therefore, the U. S. Supreme Court needs to resolve this dispute and provide federal courts with a clear answer as to the meaning of Section 1981a.

In making its decision, the Supreme Court should keep in mind that, when Congress passed the ADA, they stated it was meant "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,"[124] and to "assure equality of opportunity."[125] With this in mind, it is odd, under a strict interpretative approach, that

122. *See, e.g.*, Salitros v. Chrysler Corp., 306 F.3d 562 (8th Cir. 2002); Foster v. Time Warner Entm't Co., 250 F.3d 1189 (8th Cir. 2001).

123. *See* Kramer v. Banc of Am. Sec., 355 F.3d 961 (7th Cir. 2004).

124. 42 U.S.C. § 12101(b)(1) (2000).

125. *Id.* § 12101(a)(8).

those alleging Title I violations and those alleging retaliatory discharge are treated differently with respect to what they can recover in damages. Both actions are clearly discriminatory based on the individual's disability, but the differentiation in available remedies makes it seem as though one violation is more serious than the other. This result does not appear to be consistent with the principles of the ADA and the goals set forth by Congress at the time of the Act's passage.[126] The Court, therefore, should ideally side with the circuits that have considered the context of Section 1981a in light of the history of the ADA and allow the recovery of compensatory and punitive damages for violations of the retaliatory provision. At the very least, the Court should urge Congress to spell out specifically within Section 12203 which remedies are available instead of directing and redirecting a court's attention to other directions.

VI. CONCLUSION

It thus appears that the strict interpretive approach, which denies recovery of compensatory and punitive damages for violations of the ADA's retaliatory provision, and the broader approach, actually allowing recovery, both have advantages and disadvantages. However, the shortcomings afflicting the broader approach with regard to principles of statutory interpretation are more than made up for by public policy considerations. Due to the unfortunate circuit split on whether or not to utilize the broad or narrow approach of interpreting the relevant statutes, the U.S. Supreme Court should address this issue and ultimately permit recovery. At the same time, however, the Court should urge Congress to address this issue by considering an amendment to Section 1981a in order to dispel any future conflicts over the scope of the statute. If this were done, concerns about bending the rules of statutory interpretation could be alleviated. In a way, this would achieve the needed balance on the issue by preserving established principles of law and also coming to a sound public policy result that is fair and equitable for everyone.

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126. *See supra* notes 2-7 and accompanying text.